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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1906

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

v.

BARRY WARREN KIBBE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the court of appeals correctly found that the failure to instruct the jury on a critical and complex element of a murder charge deprived respondent of his right to a trial in accordance with due process standards.

STATEMENT

I.

PROCEDURAL BACKGROUND

On November 30, 1971, respondent was convicted after a jury trial in Monroe County Court of murder [N.Y. Penal Law §125.25(2) (McKinney 1975)], robbery in the second degree [N.Y. Penal Law §160.10 (McKinney 1975)], and grand larceny in the third degree [N.Y. Penal Law §155.30(5) (McKinney 1975)]. He was sentenced to concurrent terms of 15 years to life imprisonment on the murder conviction; five to 15 years on the robbery; and an indeterminate term of up to four years on the grand larceny conviction.[1]

II.

THE TRIAL

George Stafford died as the result of injuries he sustained when he was hit by a speeding truck driven by Michael Blake (670[2]). Respondent and his co-defendant, Roy Krall, were charged with Stafford's murder pursuant to N.Y. Penal Law §125.25, which provides in pertinent part:

[1] The habeas corpus relief granted below does not involve respondent's custody pursuant to the robbery and larceny convictions, but affects only that restraint which flows from the conviction for murder. *Peyton* v. *Rowe*, 391 U.S. 54 (1968).

[2] Numerals in parentheses refer to pages of the trial transcript. Respondent has filed a copy of the transcript with the Clerk of the Court.

> A person is guilty of murder in the second degree when:
>
> * * *
>
> 2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. . . .

A. The Prosecution Case

On December 30, 1970, at approximately 10:10 p.m., Michael Blake, then a junior at the Rochester Institute of Technology, was driving his 1965 half-ton Chevrolet pickup truck 50 miles per hour – 10 miles over the speed limit – on East River Road near Rochester, New York (A.47, 53[3]). The night was clear and the road, a two-lane, two-directional roadway, was dry (A.47, 48). Blake, who was familiar with the road because he had driven it twice weekly during the prior year and a half, described it as lightly trafficked (A.49).

As Blake proceeded north on East River Road, he passed two cars coming south. The first of these signaled to Blake by flashing its headlights. Ignoring the signal, Blake did not reduce his speed. After the cars passed, Blake saw George Stafford sitting in the middle of the northbound lane with his hands in the air. Stafford was 100 to 200 feet away when Blake first saw him. Nonetheless, Blake did not apply his brakes or attempt to avoid hitting Stafford by swerving either to the left into the southbound lane – no cars were approaching in that lane – or to the right onto the shoulder of the road (A. 49).

[3] Numerals in parentheses preceded by "A" refer to pages of the Appendix submitted to the Court.

The truck hit Stafford still traveling at full speed. According to Blake, he simply did not have time to react so as to avoid or diminish the impact. After hitting Stafford, the truck dragged Stafford's body approximately 400 feet,[4] Blake thought, and then continued on some distance until Blake could bring the truck to a complete stop (A. 47-49). Blake then turned the vehicle around and drove south in the northbound lane until he reached Stafford's body. He testified that when he saw Stafford, his pants were around his ankles and his shirt was pulled up around his chest.

The spot where Stafford was fatally injured[5] was approximately one-quarter mile north of the East River Road and Bailey Road intersection and one-quarter mile south of an open Sunoco gas station at the junction of River Meadow Road and East River Road (A. 49-50, 54-56). Stafford's shoes were discovered at the side of the road near the point of impact (A. 60).

The events of the evening, leading up to the time Stafford was left somewhere on the shoulder of East River Road, began when respondent and Krall met Stafford at Nick and Corky's Bar in Rochester, New York (720). According to the bartender, Stafford had been drinking heavily and was looking for a ride to Canandaigua. Some time between 8:30 and 9:30 p.m., after the bartender had refused to serve Stafford any more drinks or to cash a $100 bill for him, Stafford left the bar in the company of respondent and Krall[6] (720-724).

[4] According to the medical examiner, the body showed "skid marks" that could have been caused by dragging (A. 58).

[5] En route to the hospital, the ambulance carrying Stafford collided with another vehicle and was rendered inoperable. Some 10 minutes later, a second ambulance transported Stafford, who was by then barely alive, to the hospital (633-634).

[6] The bartender remembered that both Kibbe and Krall had been drinking, too (724).

Through the combined custodial statements respondent and Krall gave to the police the day after the incident, it was revealed that the two agreed to drive Stafford to Canandaigua; that before they left Rochester they stopped at two other bars, one of which agreed to serve them; and that, while en route to Canandaigua, Stafford changed his mind and decided that he wanted to return to Rochester (833-854). Toward that end, Krall, who was driving, turned north on East River Road. During this part of the trip, respondent demanded that Stafford give him his money, and the latter complied. Although respondent slapped Stafford and, according to Krall, they "wrestled" a bit, no weapons were used in this exchange (827). At one point, Stafford took off his boots and lowered his trousers to show that he had no more money (A. 62).

After this episode, according to Krall's statement, Stafford saw a store and lights on the south side of the road and asked that respondent and Krall let him out of the car (828). Krall stopped the car and Stafford got out on the passenger side and was left on the shoulder of the road[7] (853-854). At the time Stafford got out of the car, he had pulled his trousers back up to his waist, but had not put on his boots (A. 62). When respondent realized that Stafford had forgotten his jacket as well as his boots, respondent removed them from the car and placed them on the ground next to Stafford (A. 61).[8]

[7] In this regard, the statements were fundamentally inconsistent with the State's theory of culpability. According to that theory, Stafford had been abandoned on an isolated part of the roadway, one-quarter mile from the Sunoco station, close to the spot where he was hit (677-684).

[8] While this jacket was never recovered, Chief Deputy Blodgett, the officer who examined the scene of the accident, admitted that he did not check the area around the River Meadow Road intersection and the gas station to determine whether Stafford had been there (700). Stafford's personal papers and eyeglasses were recovered from Kibbe's car (708).

According to his own statement, respondent told Stafford to get to the gas station so that he would not freeze (A. 61).

B. The Defense Case

Roy Krall[9] testified for the defense. He related how he and respondent, who had spent the evening drinking at Nick and Corky's, agreed to drive Stafford to Canandaigua (1012, 1014). Respondent and Krall sat in the front seat of the car and Stafford sat in the back (1016). On the way to Canandaigua, Stafford changed his mind and decided to return to Rochester. When Krall turned the car around in response to this request, it was approximately 9:20 or 9:25 p.m. (1017).

According to Krall, it was shortly thereafter that respondent slapped Stafford and asked for his money (1017). Stafford complied. Then, as the car approached the lighted East River Road and River Meadow Road intersection, at which the gas station and a delicatessen were located, Stafford asked to get out. Krall estimated that the spot where Stafford alighted from the car was about 75 feet from the delicatessen which, like the gas station, was on the southbound side of the roadway (A. 66, 64-65). Respondent told Stafford to get there so that he wouldn't freeze, and then Krall and respondent drove away (1067). Krall specifically denied that Stafford had been left one-quarter of a mile from the River Meadow Road intersection (1064).

[9]Krall was 47 years old at the time of the trial and had no prior criminal record (1008, 1024).

C. The Challenge to the Element of Causation

Out of the presence of the jury, trial counsel moved, at the close of the prosecutor's case, and again after the defense rested, for a judgment of acquittal, on the ground that the State had failed to establish causation[10] (A. 29-33, 40). Specifically, counsel argued that respondent and Krall could not "anticipate" the injury to Stafford because they had deposited him at his request near the open and lighted gas station and delicatessen and had left him on the shoulder of the road. Injury resulted only because Stafford positioned himself in the middle of the road and the truck driver, who was speeding, did not attempt to reduce his speed or avoid hitting Stafford. The motions were denied (A. 39, 40).

In summation, defense counsel argued that it was not reasonable on these facts to find that respondent or Krall would "anticipate" the injury to Stafford (A. 68-70). Counsel made these arguments, however, only after reaffirming what the trial judge had already told the jury in his preliminary instructions: that it was the judge alone who would instruct the jury on the law[11] (A. 69-71).

The prosecutor, in his summation, addressed the question of causation, saying, *inter alia*:

[10]In pretrial motions counsel had, on similar grounds, sought to have the murder count dismissed, arguing that the connection between respondent's conduct and the injury to Stafford was "too attenuated" to establish causation (A. 24-25, 27-28).

[11]In his preliminary instructions, the judge cautioned:

> . . . I will charge you or instruct you on the law. . . .
>
> * * *
>
> As I will explain to you in detail in my charge as jurors in the case, you are the sole judges of the facts. I am the sole judge of the law. You must accept the law as I give it to you without hesitation or reservation even if you privately disagree with me.
>
> (A. 41-42).

> . . . Sure, the death, the most immediate, the most preceeding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill . . . Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there.
>
> (A. 76).

D. The Charge[12]

Reiterating that it was for the court to instruct the jury on the law, the trial judge defined such terms as "felonious," "knowing," "depraved," "indifference," "reckless," and "grave" (A. 83, 89-90). Nowhere did he define "causation," nor did he refer to concepts of superseding cause or foreseeability. Nowhere did he specifically direct that conviction required a finding that respondent "caused" Stafford's death. While the word "caused" appears in the statute, which the judge read to the jury, the judge reminded the jurors immediately thereafter that he had already provided all the definitions they needed to comprehend the statute: "I think I defined for you the different words used in that section" (A. 91).[13]

[12]The entire charge appears in the Appendix at A.77-97.

[13]Trial counsel neglected to object to the failure to instruct on causation.

III.

STATE APPELLATE PROCEEDINGS

The Appellate Division considered, *sua sponte*, the deficiency in the charge, but concluded, over a strong dissent,[14] that while the charge was lacking in detail,

> [i]n our opinion the charge together with language of the statutes and indictment and the evidence were sufficient to inform the jury on this subject and reversal of the judgments is not required in the interest of justice.

People v. *Kibbe*, 41 A.D. 2d 228, 230 (4th Dep't 1973).

On the ground that unobjected to errors are outside the constitutional and statutory limitations of its jurisdiction, the New York Court of Appeals declined

[14]The dissent explored the fundamental nature of the defects in the charge and the necessary effect on the result of the trial, commenting:

> The insufficiency of the charge deprived these defendants of their fundamental right to a fair trial insofar as these indictments charge them with murder. . . .
>
> * * *
>
> . . . The trial court's instruction on all the elements of the crimes charged occupies only about seven pages of the printed record and contains no direction on the issue of causation. . . .
>
> * * *
>
> . . . In the instant case, the jury, under proper instruction, could have concluded that the victim's death by an automobile was a remote and intervening cause. There are no statutory provisions dealing with intervening causes – nor is civil case law relevant in this context. The issue of causation should have been submitted to the jury in order for it to decide whether it would be unjust to hold these appellants liable as murderers for the chain of events which actually occurred. . . .

People v. *Kibbe*, 41 A.D.2d 228, 230-232 (4th Dep't 1973) (dissenting opinion).

to consider the error in the charge on the merits. *People* v. *Kibbe*, 35 N.Y.2d 407, 414 (1974).

IV.

FEDERAL COURT PROCEEDINGS

The United States District Court for the Northern District of New York (Foley, J.) dismissed the *pro se* petition for writ of habeas corpus on the ground, among others, that the errors in the charge were not cognizable in a federal habeas corpus proceeding (A. 21).

The United States Court of Appeals for the Second Circuit reversed the district court and granted the petition, one judge dissenting. The majority (Lumbard, J.) held:

> The bizarre circumstances that prompted Kibbe's apprehension and conviction for murder present one of those rare cases in which a habeas corpus petition pursuant to 28 U.S.C. §2254 genuinely puts at issue the guilt or innocence of the accused. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250-75, 93 S. Ct. 2041, 2059-72, 36 L.Ed.2d 854, 876-890 (1973) (Powell, J., concurring); *Rolls* v. *Manson*, 503 F.2d 391, 494-99 (2d Cir. 1974) (Lumbard, J., concurring). We hold that the trial judge's instructions permitted the jury, in its fact-finding process, to disregard Kibbe's colorable claim that, as to the murder charge, his actions had not caused the death of a decedent and thus violated Kibbe's constitutional right to have every

> element of the crime with which he was charged proven beyond a reasonable doubt. (A. 105-106).[15]

SUMMARY OF ARGUMENT

The court of appeals held that the trial judge's failure to instruct on causation violated due process in that it

[15]Not before the Court is the *sua sponte* holding of the court of appeals that the absence of objection to the charge did not constitute a deliberate by-pass. Unanimous on this point, the court below found that the entire thrust of the defense case had been to challenge the proof of causation, and consequently, counsel's failure to object could be attributed only to inadvertence. *Fay* v. *Noia*, 372 U.S. 391 (1963) (A. 109-112).

The petition for writ of certiorari did not raise this issue, and petitioner has now affirmatively acknowledged in his brief to the Court that there is no procedural impediment to respondent's habeas corpus claim (Petitioner's Brief, n. at 8-9). While the State does not contest the validity of the Second Circuit's conclusion, the State's position is that, since the State Appellate Division has considered the merits of the issue, there is no by-pass, and it is not open to the federal courts to deny relief on the grounds of waiver. *Fay* v. *Noia*, *supra*, 372 U.S. at 439; *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975); see also *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967).

Moreover, by choosing not to present the waiver issue at any time throughout the proceedings in the federal courts, petitioner has abandoned all right to have the Court consider the by-pass issue. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Dorszynski* v. *United States*, 418 U.S. 424, 431 n.7 (1974). In any event, without merit is the argument made by the Monroe County District Attorney that the failure to object at trial precluded consideration of the error on appeal to the state courts and should preclude review here (*Amicus* Brief at 5-6). This argument simply fails to take into account the plenary jurisdiction of New York State's intermediate appellate court [N.Y. Crim. Proc. Law §470.15(1) and (6)(a) (McKinney 1971)] as well as the dispositive fact that, in this case, the Appellate Division actually considered the error in the charge on the merits. *People* v. *Kibbe*, 41 A.D.2d 228, 230 (4th Dep't 1973).

removed that essential and contested element from the jury's deliberations and thereby allowed conviction without the requisite finding of each element of the crime beyond a reasonable doubt. The State acknowledges that the charge was materially deficient, but contends that the error was ameliorated by the summations of counsel and the reading of the statute.

The State's argument ignores the requirement, inherent in the right to a jury trial, that the judge instruct on the law. In this case the judge failed to explain a complex legal concept. Moreover, his explicit and repeated caution to the jury that he, alone, would provide instruction on the law prevented the jury from looking to counsel to supply what the judge omitted. The arguments of counsel were of no assistance in any event, since defense counsel and the prosecutor presented sharply conflicting theories of causation, and what the prosecutor argued was legally incorrect.

Causation was a bitterly contested issue at trial, and the prejudice in this case is that the jury, without instruction on concepts of independent intervening cause, superseding cause, and foreseeability, was without guidance to resolve the dispute. As the court of appeals found, the danger here is that the jury may well have convicted despite acceptance of facts which legally negated causation.

ARGUMENT

THE COURT OF APPEALS CORRECTLY FOUND THAT THE FAILURE TO INSTRUCT THE JURY ON A CRITICAL AND COMPLEX ELEMENT OF A MURDER CHARGE DEPRIVED RESPONDENT OF HIS RIGHT TO A TRIAL IN ACCORDANCE WITH DUE PROCESS STANDARDS.

Petitioner challenges the decision of the court of appeals that the absence of instruction on a critical and complex element of the crime deprived respondent of his due process right to have the jury determine that element beyond a reasonable doubt. The court below found that the failure to instruct on "causation," in light of respondent's colorable claim that he had not caused the death of George Stafford, made this case one of those "rare" habeas corpus proceedings which genuinely put in issue the guilt or innocence of an accused. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250-275 (1973) (Powell, J., concurring). Perusal of the entire 1,300 page trial record convinced the majority of the court of appeals that the deficiency in the charge left the jury so ignorant of the prerequisites of "legal cause" that respondent may well have been convicted despite the jury's acceptance of the defense case.

I.

Due process mandates that the fact-finding process in a criminal trial meet minimum standards of accuracy. *In re Winship*, 397 U.S. 358, 361-364 (1970). In an attempt to reduce the margin of error in critical factual determinations, and thus protect against unjustified convictions, the Constitution requires not only that the

prosecution meet its burden of proving [*Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Speiser* v. *Randall*, 357 U.S. 513 (1958)] each and every element of the crime [*Vachon* v. *New Hampshire*, 414 U.S. 478, 480 (1974)] beyond a reasonable doubt (*In re Winship*, *supra*, 397 U.S. at 364), but also that the fact-finder actually pass on the sufficiency of the evidence. *Henderson* v. *Morgan*, 96 S. Ct. 2253, 2260 (1976) (White, J., concurring).

> . . . It should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury is waived) and unless the jury finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be "harmless error" wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged. . . . *Id.*, 96 S. Ct. at 2260.

To enable jurors to meet their fact-finding obligation, the trial judge must instruct them on the law and provide guidance for their analysis of the evidence as it relates to the crime charged. The judge's obligation to instruct the jurors inheres in the very right to a jury trial. *Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946); *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931); *Patton* v. *United States*, 281 U.S. 276, 288-289 (1930); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899); *United States* v. *England*, 347 F.2d 425, 430 (7th Cir. 1975) (rehearing *en banc* denied); *United States* v. *Noble*, 155 F.2d 315, 317 (3d Cir. 1946).

> "Trial by jury" in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men . . . but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law. . . . *Capital Traction Co.* v. *Hof*, *supra*, 174 U.S. at 13-14.

Lord Hale, in his treatise on the common law, extolled the virtues of a jury trial largely because of the active superintendence and guidance of the trial judge:

> Another excellency of this trial is this: that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law emerging upon the evidence, to direct them, and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assist the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact whereof the jury are the judges. . . .[Jury trial] has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

2 Hale, THE HISTORY OF THE COMMON LAW 147, 156 (5th ed. 1794).

Indeed, the Court has held that the jury's ability to perform its function is dependent upon the discharge of the judge's duty to provide essential guidance through "a lucid statement of the relevant legal criteria." *Bollenbach* v. *United States*, *supra*, 326 U.S. at 612.

The trial judge in this case failed completely to provide the required instructions. Nowhere in the charge is there the explicit direction, mandated by the penal law provision, that a conviction for murder requires a finding that respondent's actions "caused" the death. N.Y. Penal Law §125.25(2) (McKinney

1975). Nor is the legal concept of causation ever defined. Analysis of the remainder of the charge convinced the court below that nothing that followed the omissions mitigated the deficiency; indeed, what did appear was found to have aggravated the error. For example, the definitions of "depraved," "indifference," "human life," "reckless," and "grave," the other terms in the statute, highlighted the absence of any definition of causation, and suggested its irrelevance to the deliberations (A. 113). In this context, the subsequent caveat accompanying the recitation of the statute – that all the operative terms had already been defined – could function only to convey the mistaken impression that causation was not in the case.[16]

Based on the extent of the deficiency in the charge and the complexity of the element omitted, the court of appeals was compelled to conclude that the charge was void of instruction on causation. And when, as here, the error is one of total omission, there is no room for conjecture about what the jury understood from conflicting or ambiguous instructions. In the absence of any judicial direction, the jury simply had no way of knowing that causation was an element for their determination.

This error was particularly prejudicial here. This "bizarre" case, as the court of appeals characterized it (A. 105), is dramatically distinct from the usual situation in criminal cases, where the causal relationship is so clear and direct as not to be in issue: for example,

[16]This misconception was no doubt reinforced, the court of appeals found, in the brief instruction on manslaughter which made passing reference to "cause," but emphasized the element of "recklessness," implying again that causation could be assumed while recklessness was still to be determined (A. 113 n.5).

conviction for murder when the defendant intentionally slew the victim, or conviction for arson when the defendant put a lighted match to the building. Here, on these "singular" facts (A. 112), the causal connection was sharply contested, and its resolution was determinative of the outcome of the murder charge. In this context, the court of appeals found that the failure of the judge's charge to provide any instruction on causation precluded the jury's consideration of that pivotal element of the crime and violated respondent's right to due process. *Screws* v. *United States*, 325 U.S. 91, 106-107 (1945); *United States* v. *Singleton*, 532 F.2d 199, 206-207 (2d Cir. 1976); *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974); *United States* v. *Small*, 472 F.2d 818, 819 (3d Cir. 1972); *United States* v. *England*, *supra*, 347 F.2d at 430; *United States* v. *Noble*, *supra*, 155 F.2d at 316-317; see also *Mullaney* v. *Wilbur*, *supra*, 421 U.S. at 705-706 (Rehnquist, J., concurring); *Cool* v. *United States*, 409 U.S. 100 (1972); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403-404 (1966); *cf. Barnes* v. *United States*, 412 U.S. 837 (1973); *Turner* v. *United States*, 396 U.S. 398, 419 (1970); *Leary* v. *United States*, 395 U.S. 6, 36 (1969) (direction to find an essential fact by means of faulty thought process is violative of due process).[17]

[17]The error is so fundamental to the fairness of the proceeding and to the defendant's constitutional right to a jury trial that it mandates reversal of the conviction, despite the absence of objection by counsel. *United States* v. *Singleton*, 532 F.2d 199, 207 (2d Cir. 1976); *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974); *United States* v. *Clark*, 475 F.2d 240, 248-251 (2d Cir. 1973); *United States* v. *Small*, 472 F.2d 818, 819 (3d Cir. 1972). This would be so even were counsel affirmatively to agree to the deficient charge. *United States* v. *Bosch*, 505 F.2d 78, 79-82 (5th Cir. 1974).

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt.
>
> *United States* v. *Clark*, *supra*, 475 F.2d at 248.

at 248.

II.

Petitioner acknowledges, as he obviously must, that an error in a jury instruction can violate due process (Petitioner's Brief at 10-11), and that the instruction here was deficient. However, the major thrust of petitioner's challenge to the decision below is that the deficiencies in the charge were compensated for by arguments of counsel. The court of appeals considered this theory and properly rejected it (A. 113 n.5).[18]

In the instant case, the jury was specifically and repeatedly cautioned by the trial judge, as well as by counsel, that the judge alone would instruct on the law and the jury had to accept the law as the judge explained it.[19] So cautioned, the jurors were in no position to look to counsel for legal guidance, even assuming they were aware of the defects in the judge's charge. Moreover, assistance by counsel was not a possibility here, since each side argued different and conflicting legal theories.[20] At best, the jurors would be

[18]Of course, the arguments of counsel are important – in fact, constitutionally mandated [*Herring* v. *New York*, 422 U.S. 853 (1975)] – but it does not follow, *ipso facto*, that they supplant the judge's charge. Just as the judge cannot substitute for counsel, counsel cannot substitute for the judge.

[19]This warning was initially given in the judge's preliminary instructions (A. 41, 42), and was repeated by him in his main charge (A. 83), as well as by counsel in his summation (A. 69, 71).

[20]The prosecutor urged the jury simply to determine responsibility by a *sine qua non* test: "[W]ould this man be dead had it not been for the acts of these two defendants? And I submit to you members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. . . ." (A. 76). In contrast, defense counsel argued that respondent and his co-defendant were not responsibile since they did not "perceive" the risk and could not be expected to anticipate that Blake would be driving over the speed limit and that Stafford would place himself in the middle of a lane of oncoming traffic (A. 68, 70).

confused as to which theory was correct. See *Andres* v. *United States*, 333 U.S. 740, 765-766 (1948) (Frankfurter, J., concurring). Certainly, it ill behooves petitioner to argue that the prosecutor's summation, in which he argued to the jurors an erroneous and misleading theory of law, provided sufficient guidance.[21]

The weakness of petitioner's argument is illustrated by the fact that in none of the cases upon which he relies are the arguments of counsel found to be adequate remedy for deficiencies in the judge's charge. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 148-149 (1973); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). In each of these cases, the Court found corrections for the claimed errors within the confines of the charge itself.

In fact, *Cupp* v. *Naughten*, *supra*, upon which petitioner places his primary reliance, is demonstrative only of the principle that a charge to the jury can be self-correcting. In *Cupp*, the defendant challenged an instruction on the presumption of truthfulness, claiming that the charge violated the presumption of innocence and reduced the prosecutor's burden of proof. In rejecting this claim, the Court noted that the charge contained complete and accurate statements on the presumption as well as the burden of proof, and the only question presented was whether one erroneous statement, which by its own language was not in conflict, nonetheless impliedly nullified the remainder of the instruction that was correct. The Court then

[21]Of course, in the context of the facts of this case, the "but for" test is wholly insufficient to resolve the question of causation. Perkins, CRIMINAL LAW at 722-723 (1969); see *infra* at 20-23.

refused to grant relief on an "error" which, only as a matter of "abstract" logic, "tangentially . . . impinged" on the defendant's rights. *Cupp* v. *Naughten, supra,* 414 U.S. at 148.

In contrast, the charge in this case contained no corrective statements to neutralize the error of omission. Significantly, the gap did not pertain to matters of "abstract" logic, but instead to the essence of the jurors' function: determination of the facts necessary to convict.

Nonetheless, indulging for the moment petitioner's hypothesis that the jury ignored the omissions in the charge and, undaunted, perceived the importance of finding causation, the deficiencies in the charge were still fatal to the deliberations and the hypothesis fails to aid petitioner's case. The court of appeals noted that the concept of legal cause is extremely complex, requiring "that fine distinctions be made," for example, between "intervening" and "supervening" cause (A. 114). Unfortunately, the jury of laymen had no way of appreciating this complexity. Absent direction from the trial judge, the jurors were left to conclude, as the prosecutor indeed argued they should, that respondent was guilty of murder if, but for his act of abandoning Stafford on East River Road, Stafford would not have died.

While a finding that respondent's conduct was a cause *sine qua non* of Stafford's death is relevant to analysis of the causation problems this case presents, it is the beginning, not the end, of the inquiry. Stafford was killed not when respondent left him on the shoulder of the road, but when, some 40 minutes later,

Blake's truck, an independent intervening force,[22] struck him.[23]

Here, the determination of whether respondent's conduct was a sufficiently direct cause of Stafford's death to make him criminally liable required analysis and application of the concept, beyond the ken of a jury functioning without specific instructions, that respondent's liability could be precluded by an independent superseding cause.[24] *Bush* v. *Commonwealth,* 78 Ky. 268, 270-272 (1880); 1 Wharton, CRIMINAL LAW AND PROCEDURE §200 (1957).[25] The court of appeals held that controlling questions are "whether the ultimate result was foreseeable to the original actor and whether the victim failed to do something easily within his grasp that would have extricated him from danger" (A. 115-116); 1 Wharton,

[22]An independent intervening cause is defined as "one which operates upon a condition produced by an antecedent, but is in no sense a consequence thereof." Perkins, CRIMINAL LAW, *supra,* at 722.

[23]On the prosecutor's theory of liability, an innocent motorist who discharges a hitchhiker subsequently killed in a traffic accident has caused the latter's death.

[24]This concept was lost on the prosecutor, who revealed in his summation (A. 76) the failure to distinguish between dependent intervening causes, which cannot be superseding [*State* v. *Pell,* 140 Iowa 655, 119 N.W. 154, 158 (1909); see also *Warren* v. *State,* 3 Div. 874, 25 So.2d 51, 53 (Ala. 1946)] and independent intervening causes, which can be. Perkins, CRIMINAL LAW, *supra,* at 723.

[25]In *Bush,* the victim died of scarlet fever contracted from a doctor who was called to minister to the gunshot wounds inflicted by the defendant. Although the defendant's action was a *causa sine qua non* of the death by disease, the Kentucky Court of Appeals held that the jury could find that the disease was the supervening cause, excusing the defendant's liability.

CRIMINAL LAW AND PROCEDURE, *supra*, §200; Perkins, CRIMINAL LAW, at 725-727 (1969).

The circumstances surrounding respondent's actions are susceptible to a finding that the injury that eventually befell Stafford was not foreseeable. There was evidence at trial that respondent left Stafford, at the latter's request,[26] not more than 75 feet from an open and lighted gas station and store.[27] The roadway, which was two lanes wide, was described as lightly trafficked.[28] Stafford was deposited on the shoulder of the road and told by respondent to get to the gas station.

Significantly, Stafford was not injured on the side of the road where he had been left. He was struck by Michael Blake's truck because, in part, he placed himself in an upright position in the center of the northbound lane of traffic. In addition, Stafford was hit because Blake was driving faster than the speed limit allowed. Moreover, Blake had failed to heed a clear signal from an oncoming motorist warning him to slow down. Finally, although the night was clear, the road dry, and Blake, who was familiar with the road, had approximately 200 feet in which to react, he simply failed to do so.

[26]This is certainly evidence that Stafford, despite his inebriated condition, was alert enough to perceive a place of safety and that respondent could reasonably believe that Stafford was capable of getting to it.

[27]When Stafford left the car, he was wearing his pants and a shirt, and respondent gave him his shoes and jacket. Stafford's subsequent state of undress, as described by Blake, was clearly the result of Stafford's being dragged by the truck (A. 52-53).

[28]Indeed, the road was so lightly trafficked that Blake, the truck driver who fatally injured Stafford, felt secure in returning to the spot where he had hit Stafford by driving south in the northbound lane.

Certainly respondent was entitled to have the jurors evaluate the foreseeability of injury in light of both Stafford's conduct[29] and Blake's. LaFave & Scott, CRIMINAL LAW, 257-263 (1972). This is especially true in light of the defense argument that respondent had left Stafford near the open gas station and that Stafford had chosen to walk in the opposite direction.[30]

[29]While usually the contributory negligence of the victim is not to be considered on the question of criminal causation, where that negligence is a substantial factor as compared to the actions of the accused, it is not to be disregarded. Perkins, CRIMINAL LAW, *supra*, at 703.

[30]Despite the fact that respondent's action of leaving Stafford on the side of the road subjected him to the danger of exposure or of being hit by a passing vehicle, if, before injury, Stafford had made his way to a position of apparent safety, respondent would not have been legally responsible for Stafford's death. *State* v. *Preslar*, 48 N.C. Rep. 417, 423 (1856); see also Beale, *The Proximate Cause of an Act*, 33 Harv. L. Rev. 633, 651 (1920); Edgerton, *Legal Cause*, 72 U. Pa. L. Rev. 211, 239-240 (1924).

In *State* v. *Preslar*, *supra*, 48 N.C. Rep. 417, the defendant beat his wife severely and turned her out of the house at night. She subsequently died of exposure. However, the evidence in the case established that the wife had made her way safely to her father's home but, for reasons of her own, decided not to enter his house at night and chose instead to sleep outside. The North Carolina Court of Appeals held that because the victim had arrived at a place of safety but did not avail herself of it, the harm caused by the defendant's conduct had come to a halt, and he was therefore not guilty of murder.

This logic applies with equal force to the defense contention in this case that respondent left Stafford near the gas station. If Stafford, for reasons of his own, decided not to seek accessible shelter at the gas station but instead chose to remain on the road where he walked approximately one-quarter of a mile before being hit, respondent's actions were not sufficient cause of Stafford's death.

Based on the unique facts and circumstances in this case, the court of appeals granted the writ because of its concern that the omissions in the instructions permitted the jury to convict despite the belief of evidence which should have resulted in a conclusion that respondent was not guilty of murder. The omissions deprived respondent of his due process right to a fair trial. *In re Winship, supra*, 397 U.S. at 364.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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